

Modifying Order

114 F.T.C.

IN THE MATTER OF

T&N PLC

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3312. Consent Order, Nov. 8, 1990—Modifying Order, Nov. 13, 1991

This order reopens the proceeding and modifies the Commission's 1990 order [113 FTC 1016], regarding the divestiture of certain thinwall engine bearing assets. The Commission has determined that the potential harm to respondent's ability to compete outweighs any further need to require a divestiture of the remaining VanAm inventory.

ORDER REOPENING PROCEEDING
AND MODIFYING ORDER

On September 24, 1991, respondent T&N plc ("T&N") filed a "Request for Confirmation that T&N has Discharged its Obligation to Divest the Thinwall Engine Bearing Assets or, in the Alternative, to Reopen the Proceeding and Modify the Consent Order" ("Request") pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rule 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. T&N seeks acknowledgement that it has fully complied with its obligations under paragraph III of the consent order in Docket No. C-3312 ("order") to divest the thinwall engine bearing assets or, in the alternative, a modification of paragraph I.10(a) of the order to relieve it of any further divestiture obligations under paragraph III.

Paragraph III of the order requires T&N to divest the "thinwall engine bearing assets" by November 21, 1991. Paragraph I.10(a) defines the term "thinwall engine bearing assets" to include, among other things:

All assets relating to the sale, marketing and distribution of bearings for U.S. gasoline engine applications manufactured by Vandervell directed to the U.S. aftermarket that are based at VanAm's facility in Tucker, Georgia, including, but not limited to, all customer lists, inventory (to be repackaged in plain boxes), and assignment of the building lease and all agreements with sales agencies and fee warehouses, excluding any trademarks or trade names[.]

To date T&N has received Commission approval for a divestiture to

Automotive Components Limited ("ACL") of all the thinwall engine bearing assets required to be divested, with the exception of part of the VanAm inventory.

T&N asserts that the language and purpose of the order do not require it to divest all the VanAm inventory. T&N asserts that where the order requires the divestiture of "all" of a particular asset, it uses the word "all." Paragraph I.10(a) does not call for the divestiture of "all inventory." In addition, T&N urges that requiring the divestiture of the remaining VanAm inventory would be inconsistent with the Commission's unconditional approval of the divestiture to ACL. The Commission notified T&N by letter dated January 30, 1991, that it had approved the divestiture to ACL. That letter did not explicitly require T&N to take any further action to satisfy its obligation under paragraph III. Furthermore, T&N notes that at the time the Commission approved the divestiture to ACL, the Commission was aware of the fact that ACL did not intend to acquire all of the VanAm inventory. In light of the above, T&N asserts that it has complied fully with its obligation under paragraph III to divest the thinwall engine bearing assets.

T&N's arguments are not persuasive. The language of paragraph I.10(a) clearly requires T&N to divest all of the VanAm inventory. T&N's argument ignores the fact that the definition at paragraph I.10(a) begins with the language "all assets relating to the sale, marketing and distribution of bearings for U.S. gasoline engine applications manufactured by Vandervell directed to the U.S. after-market that are based at VanAm's facility in Tucker, Georgia, . . ." (emphasis added). By T&N's own reasoning, because the order expressly uses the word "all" it requires the divestiture of "all assets." The definition identifies a number of assets, such as customer lists and inventory, required to be divested. In enumerating those particular assets the definition uses the language: "including, but not limited to, . . ." (emphasis added). The particular assets enumerated in paragraph I.10(a), such as "all customer lists," operate not as words of limitation, but rather as words to describe some of the assets included within the universe of "all assets." The inventory falls within this universe, and T&N is required to divest all of it.

Furthermore, assuming *arguendo* that its construction of paragraph I.10(a) is correct, T&N fails to explain what part of the inventory it is required to divest. The Commission has explicitly stated in some orders, for example, that the assets in question be divested at the

election of the acquirer. *See e.g.*, Flowers Industries, Inc., Docket No. 9148, 102 FTC 1700 (1983). The Commission has not done so in this case.

Finally, T&N's assertion that the Commission should have attached some condition to its approval of the divestiture to ACL is unfounded. Nothing in the order required the Commission to take such action in the event T&N chose to divest something less than all the thinwall engine bearing assets. The order does not require T&N to divest the assets to a single acquirer. The language of paragraph III(A) states that the divestiture of the thinwall assets "shall be only to an acquirer (or acquirers) that receive the prior approval of the Commission," (emphasis added), clearly recognizing the fact that the divestiture of the thinwall engine bearing assets might require T&N to enter into one or more transactions. Similarly, the Commission did not condition its approval of the divestiture to ACL upon T&N's divestiture of the tri-metal heavywall engine bearing assets required by paragraph IV of the order. The Commission obviously did not thereby relieve T&N of its obligation to divest those assets.

Accordingly, the Commission believes that T&N has not fulfilled its obligation to divest the thinwall engine bearing assets and will treat T&N's Request as a petition to reopen and modify the order.

T&N asserts that it would be in the public interest to reopen and modify the order to relieve it of the obligation to divest the remaining thinwall engine bearing assets. T&N has not requested, and the Commission has not considered, reopening and modification of the order on the basis of changed conditions of fact or law. Pursuant to Rule 2.51, the Request was placed on the public record for ten days. No comments were received.

After reviewing respondent's Request, the Commission has concluded that the public interest warrants reopening the order and modifying the language of paragraph I.10(a) to relieve T&N of any further obligation to divest thinwall engine bearing assets.

Reopening and Modification of a Commission Order.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission "shall reopen" an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside in whole or in part."¹ The language

¹ Section 5(b) provides,

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative

(footnote cont'd)

of Section 5(b) plainly anticipates that the burden is on the petitioner to make the satisfactory showing of changed conditions to obtain a reopening. T&N has not requested relief on these grounds.

The Commission may also modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Respondents are invited in requests to reopen to show how the public interest warrants the requested modification. 16 CFR 2.51(b). In the case of a request for modification based on this ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. See *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 24, 1983) (unpublished) ("Damon Letter"), at 2. For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." *Damon Corp.*, Docket No. C-2916, 101 FTC 692 (1983). Once this showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. See Damon Letter at 2; see, e.g., *Chevron Corp.*, Docket No. C-3147, 105 FTC 228 (1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for the order). The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The Order Should Be Reopened and Modified

T&N has demonstrated an affirmative need to modify the order. *Damon Corp.*, *supra*. T&N has demonstrated that the goals of the divestiture have been achieved and that requiring T&N to divest the remaining VanAm inventory could create an impediment to ACL's, as well as T&N's, ability to compete effectively.

ACL neither wants nor needs any additional VanAm inventory. ACL acquired from T&N the exclusive right to use the VanAm trademark until February, 1992, and the non-exclusive right to use the trademark until March, 1993. ACL acquired the rights to the VanAm

relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codified[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

trademark to allow it to enter the market in an orderly fashion and to establish its presence in the market before developing its own trademark. Accordingly, it acquired sufficient quantities of the VanAm inventory to service its needs for that period of time. The order as currently written, however, requires T&N to divest all of the VanAm inventory, whether or not ACL wants or needs that additional inventory. If ACL, nonetheless, acquired the additional inventory, it would incur costs it did not anticipate in acquiring the rest of the thinwall engine bearing assets, which could undermine its ability to compete.

T&N is also being harmed by the continued operation of the Asset Maintenance and Improvement Agreement ("Asset Agreement"). The Asset Agreement prohibits T&N from integrating the McConnellsville facility it obtained from JP Industries into its other operations until it has accomplished the divestitures required by the order.² T&N has demonstrated that the Asset Agreement imposes considerable costs on its operations and limits its ability to respond to changes in the market, thereby reducing its ability to compete effectively.

The reasons favoring modification outweigh any reasons for retaining the order as written. Requiring T&N to divest the remaining inventory would not provide any competitive benefit, since there is no reason to believe that such a divestiture would facilitate entry of a new competitor.

The purpose of the thinwall engine bearing assets divestiture is "to remedy the lessening of competition resulting from the acquisition of [JP Industries] by T&N," order at ¶ III, by establishing an acquirer, in this case ACL, as a viable competitor in the market. The order does not seek to reduce competition by depriving T&N of the assets it needs to compete. Here, T&N has divested most of the thinwall engine bearing assets as required by the order and in doing so has satisfied the purpose of the order by establishing ACL as a competitor in the market.³ Having determined that ACL would be a viable competitor

² On September 10, 1991, the Commission approved T&N's application to divest the tri-metal heavywall engine bearing assets to Babbitt Bearings, Inc. T&N and Babbitt Bearings closed that transaction on September 18, 1991.

³ In *Batus, Inc.*, Docket No. C-3099, 104 FTC 632 (1984), the Commission modified the order to eliminate the respondent's remaining obligation to divest assets where the respondent had demonstrated a good faith effort to comply fully with the divestiture requirements of the order and had divested most of those assets. The Commission modified the order in *Chevron, supra*, to eliminate a hold separate agreement where the respondent had submitted divestiture applications for all the assets required to be divested and the Commission had approved the divestitures with the exception of one application. The final divestiture application was awaiting Commission action. The Commission held that the potential harm resulting from the costs of continuing the hold separate agreement outweighed any need to keep it in effect. The hold separate had "accomplished its primary objectives" and was therefore eliminated.

without obtaining all the VanAm inventory, the Commission sees no need to require T&N to divest the remaining VanAm inventory. In addition, modification of the order to relieve T&N of its remaining divestiture obligation will also result in the termination of T&N's continuing obligations under the Asset Agreement.

Having balanced the reasons favoring the requested modification against those opposing the modification, the Commission has determined that the potential harm to respondent's ability to compete outweighs any further need to require a divestiture of the remaining VanAm inventory. *Chevron Corp., supra.* In addition, T&N has shown that the modification it seeks would eliminate that impediment.

Accordingly, *it is ordered*, that the proceeding be, and it hereby is, reopened for the purpose of modifying the order entered therein;

It is further ordered, That Paragraph I.10(a) be, and hereby is, amended to read:

All assets relating to the sale, marketing and distribution of bearings for U.S. gasoline engine applications manufactured by Vandervell directed to the U.S. aftermarket that are based at VanAm's facility in Tucker, Georgia, including, but not limited to, all customer lists, at the option of the acquirer all or part of VanAm's inventory (to be repackaged in plain boxes), and assignment of the building lease and all agreements with sales agencies and fee warehouses, excluding any trademarks or trade names;

IN THE MATTER OF

NINTENDO OF AMERICA INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3350. Complaint, Nov. 14, 1991—Decision, Nov. 14, 1991.

This consent order prohibits, among other things, a Redmond, Wa., based corporation from fixing the prices at which its dealers advertise and sell Nintendo home video-game hardware to consumers. In addition, the consent order requires the respondent to mail a letter to all of its dealers advising them of the order and that they can advertise and sell the products at any price without adverse action by Nintendo.

Appearances

For the Commission: *L. Barry Costilo, Kevin J. Arquit, and Michael E. Antalics.*

For the respondent: *Robert A. Longman, Mudge, Rose, Guthrie, Alexander & Ferdon, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Nintendo of America Inc. (hereinafter "Nintendo" or "respondent") has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business at 4820-150th Ave., N.E., Redmond, Washington. Respondent is a wholly-owned subsidiary of Nintendo Co. Ltd., with its principal place of business in Kyoto, Japan.

PAR. 2. Respondent is now, and for some time has been, engaged in the offering for sale, sale and distribution of home video game

hardware, software and accessories to retail dealers located throughout the United States, including many of the nation's largest retail chains. Respondent's Nintendo Entertainment System is the number one selling toy in America. In 1989, Nintendo products, and products licensed by Nintendo, accounted for \$2.7 billion in retail sales. In 1989, Nintendo home video game hardware accounted for over 80% of all home video game hardware sales, and Nintendo software, together with Nintendo licensed software, accounted for over 80% of all home video game software sales.

PAR. 3. Nintendo maintains, and has maintained, a substantial course of business, including the acts or practices alleged in the complaint, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In connection with the sale and distribution of Nintendo products, respondent, in combination, agreement and understanding with certain of its dealers, has engaged in a course of conduct to maintain the resale prices at which certain of its dealers advertise, offer for sale, and sell its home video game hardware.

PAR. 5. The purpose, effects, tendency, or capacity of the acts and practices described in paragraph 4 are and have been to restrain trade unreasonably and hinder competition in the provision of home video game products in the United States, and to deprive consumers of the benefits of competition in the following ways, among others:

(a) Prices to consumers of Nintendo home video game hardware have been increased; and

(b) Price competition for Nintendo home video game hardware among retail dealers has been restricted.

PAR. 6. The aforesaid acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts and practices are continuing and will continue in the absence of the relief requested.

Commissioner Yao not participating.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and

which, if issued by the Commission, would charge respondent with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Nintendo of America Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its principal place of business located at 4820-150th Ave., N.E., Redmond, Washington. Respondent is a wholly-owned subsidiary of Nintendo Co. Ltd., with its principal place of business in Kyoto, Japan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For the purpose of this order, the following definitions shall apply:

(1) "*Product*" means any home video game hardware, software, accessories, or items related thereto which are manufactured, offered for sale or sold by respondent to dealers.

(2) “*Dealer*” means any person, corporation, or firm not owned by Nintendo that in the course of its business sells any product. The term “dealer” does not include licensees of Nintendo which do not act as agents, representatives, or distributors of Nintendo.

(3) “*Resale Price*” means any price, price floor, price ceiling, price range, or any mark-up formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established, or customary resale price as well as the retail price advertised, promoted or offered for sale by any dealer.

II.

It is ordered, That respondent Nintendo of America Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale or distribution of any product in or affecting “commerce,” as defined by the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Fixing, controlling, or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

(2) Requiring, coercing, or otherwise pressuring any dealer, directly or indirectly, to maintain, adopt, or adhere to any resale price.

(3) Securing or attempting to secure, directly or indirectly, any commitment or assurance from any dealer concerning the resale price at which the dealer may advertise, promote, offer for sale or sell any product.

(4) Reducing the supply of products to any dealer or imposing different credit terms in whole or in part due to the dealer’s resale price of any product.

(5) Requesting dealers, directly or indirectly, to report the identity of other dealers who advertise, promote, or offer for sale or sell any product below any resale price.

(6) For a period of five (5) years from the date on which this order becomes final, terminating any dealer due in whole or in part to the dealer’s resale price of any product. *Provided, however,* that the respondent retains the right to terminate unilaterally any dealer for lawful business reasons, unrelated to resale prices, that are not inconsistent with this paragraph or any other paragraph of this order.

III.

It is further ordered, That, for a period of five (5) years from the date on which this order becomes final, respondent shall clearly and conspicuously state the following on any list, advertising, book, catalogue, or promotional material where respondent has suggested any resale price to any dealer:

ALTHOUGH NINTENDO OF AMERICA INC. MAY SUGGEST RESALE PRICES FOR PRODUCTS, DEALER IS FREE TO DETERMINE ON ITS OWN THE PRICES AT WHICH IT WILL SELL THE PRODUCTS.

IV.

It is further ordered, That within thirty (30) days after the date on which this order becomes final, respondent mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to all of respondent's present dealers, personnel, distributors, agents, or representatives having sales or policy responsibilities with respect to respondent's products.

V.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the respective corporation which may affect compliance obligations arising out of the order.

VI.

It is further ordered, That respondent, within sixty (60) days after this order becomes final, and at such other times as the Commission or its staff shall request, file with the Commission a verified written report setting forth in detail the manner and form in which respondent has complied and is complying with this order.

Commissioner Yao not participating.

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Decision and Order

EXHIBIT A

Dear Retailer:

Nintendo of America Inc. has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission prohibiting certain practices relating to resale prices. A copy of the Order is enclosed. Nintendo has also agreed to a similar order with New York, Maryland and other states. This letter and the accompanying Order have been sent to all of our dealers, sales personnel and representatives.

The Order spells out our obligations in greater detail, but we want you to know and understand the following:

1. You can advertise and sell our products at any price you choose.
2. We will not take any adverse action against you because of the price at which you advertise or sell our products.
3. While we may send materials to you which may contain our suggested retail prices, you are completely free to disregard these suggestions.

Sincerely yours,

President
Nintendo of America Inc.

IN THE MATTER OF
CONNECTICUT CHIROPRACTIC ASSOCIATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3351. Complaint, Nov. 19, 1991—Decision, Nov. 19, 1991

This consent order requires, among other things, an association of approximately 350 chiropractors to cease and desist from prohibiting, regulating, or interfering with its members offering free services or services at discounted fees and from prohibiting, regulating, or interfering with its members' advertising.

Appearances

For the Commission: *Andrew D. Caverly* and *Phoebe D. Morse*.

For the respondent: *Robert L. Hirtle, Jr., Rogin, Nassau, Kaplan, Lassman & Hirtle*, Hartford, CT.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Connecticut Chiropractic Association, a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Federal Trade Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Connecticut Chiropractic Association ("respondent" or "CCA") is a corporation formed and doing business pursuant to the laws of the State of Connecticut. Respondent is a voluntary association of approximately 350 chiropractors, constituting approximately 86 percent of the chiropractors practicing in Connecticut. Its principal business office is located at 28 Main Street, East Hartford, Connecticut.

PAR. 2. Respondent is a corporation organized for the purpose, among others, of serving the interests of its members by associating them into a practical business organization and is engaged in substantial activities that further its members' pecuniary interests. By

virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 3. Respondent's members are engaged in the business of providing chiropractic services for a fee. Except to the extent that competition has been restrained as alleged herein, and depending on their geographic location, respondent's members have been and are now in competition among themselves and with other chiropractors.

PAR. 4. The acts and practices of CCA, including those herein alleged, are in commerce or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 5. Respondent has acted as a combination of its members, or conspired with at least some of its members, to restrain competition among chiropractors in the State of Connecticut by prohibiting its members from offering free services and services at discounted fees, and from disseminating truthful, nondeceptive information through advertising and other means.

PAR. 6. In furtherance of the combination or conspiracy alleged in paragraph five, CCA has engaged in the following acts or practices, among others:

A. Adopted and maintained provisions in its Ethical Code that prohibit its members from:

1. Offering free services or services at discounted fees to consumers, thereby deterring price competition among members;
2. Advertising free or discounted services to consumers, including by use of coupons, thereby deterring members from offering such services and depriving consumers of truthful information;
3. Advertising that CCA considers to be "sensational," "undignified," and not in "good taste," thereby discouraging advertising that is effective because it attracts attention or is memorable; and
4. Implying that they possess "unusual expertise" without meeting additional experience and educational requirements that a recognized chiropractic accrediting agency has approved, thereby depriving consumers of truthful information regarding the quality of chiropractors in areas of practice for which no certification exists, and the quality of chiropractors who acquire expertise in areas of practice without receiving certification.

B. Coerced its members to comply with its Ethical Code by, among other things:

1. Threatening members who violate the Code with expulsion from CCA;

2. Threatening, in the CCA quarterly journal and at CCA meetings, members who advertise free or discounted services that CCA will attempt to influence health insurance companies to disallow or reduce reimbursements to their patients; and

3. Threatening, in the CCA quarterly journal and at CCA meetings, members who violate the Code that CCA will report them to chiropractic malpractice insurance carriers.

PAR. 7. Respondent's actions described in paragraphs five and six have had, or have the tendency and capacity to have, the following effects, among others:

A. Restraining competition among chiropractors with respect to price, quality, and other terms of service;

B. Depriving consumers of truthful, nondeceptive information about the availability, price, and quality of chiropractic services; and

C. Depriving consumers of the benefits of free and open competition among chiropractors.

PAR. 8. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45. Such combination or conspiracy, or the effects thereof, is continuing and will continue or recur absent the entry against respondent of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged

in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Connecticut Chiropractic Association is a corporation, organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its principal business office located at 28 Main Street, East Hartford, Connecticut.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for the purposes of this order, the following definitions shall apply:

A. "CCA" means the Connecticut Chiropractic Association and its Executive Board, committees, officers, directors, agents, representatives, employees, successors, and assigns;

B. "Disciplinary action" means, but is not limited to, revocation or suspension of, or refusal to grant, membership, or the imposition of a reprimand, warning, probation, or any other penalty or condition;

C. "Person" means any natural person, corporation, partnership, unincorporated association, or other entity; and

D. "Regulating" means (1) adopting or maintaining any rule, regulation, interpretation, ethical ruling, policy, or course of conduct; (2) taking or threatening to take formal or informal disciplinary action; or (3) conducting investigations or inquiries.

II.

It is further ordered, That CCA, directly or indirectly, or through any corporate or other device, in connection with its activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall forthwith cease and desist from:

A. Prohibiting, regulating, or interfering with any of the following practices of its members:

1. Offering free services or services at discounted fees to consumers;

2. Advertising, including but not limited to:

(a) Advertising free services or services at discounted fees to consumers, including by use of coupons;

(b) Advertising that CCA considers to be "sensational," "undignified," or not in "good taste;" and

(c) Implying that they possess "unusual expertise," *provided, however,* that CCA may restrict members' claims of specialization, unless additional experience and educational requirements have been met that are approved by a recognized chiropractic accrediting agency.

B. Inducing, suggesting, urging, encouraging, or assisting any non-governmental person or organization to take any action that if taken by CCA would violate Part II.A. of this order.

Provided That, nothing contained in this order shall prohibit CCA from adopting, maintaining, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, advertising, or other communications that CCA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

III.

It is further ordered, That CCA shall:

A. Distribute by first-class mail hard copies of this order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order in the following manner:

(1) Within thirty (30) days after the date this order becomes final, to each CCA member; and

(2) For five (5) years after the date this order becomes final, to each applicant for membership in CCA within thirty (30) days after CCA receives such application;

B. Within ninety (90) days after the date this order becomes final, publish this order, the accompanying complaint, and an announcement in the form shown in Appendix A to this order in *The Connecticut Yankee* (CCA's quarterly journal), or any successor publication, in the same size type normally used for articles that are published in *The Connecticut Yankee* or in that successor publication;

C. Within thirty (30) days after this order becomes final, remove from CCA's Ethical Code, Bylaws, and any other existing policy statement or guideline of CCA, any provision, interpretation, or policy statement that is inconsistent with Part II of this order;

D. Within sixty (60) days after this order becomes final, publish and distribute to all members of CCA and to all personnel, agents, or representatives of CCA, revised versions of CCA's Ethical Code, Bylaws, and any other existing policy statement or guideline of CCA;

E. File with the Federal Trade Commission within one hundred and twenty (120) days after the date this order becomes final, one (1) year after the date this order becomes final, and at such other times as the Federal Trade Commission may by written notice to CCA request, a verified report in writing setting forth in detail the manner and form in which CCA has complied and is complying with this order;

F. For a period of five (5) years after the date this order becomes final, maintain and make available to the Federal Trade Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail all action taken in connection with any activity covered by Parts II and III of this order, including all written communications and all summaries of oral communications, and all disciplinary action; and

G. Notify the Federal Trade Commission at least thirty (30) days prior to any proposed changes in CCA, such as dissolution or reorganization resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this order.

Commissioner Yao not participating.

APPENDIX A

[Date]

ANNOUNCEMENT

As you may be aware, the Connecticut Chiropractic Association ("CCA") has entered into a consent agreement with the Federal Trade Commission that became final on [Date]. The order issued pursuant to the consent agreement provides that CCA may not interfere if its members wish to engage in any of the following activities:

- (1) Offering free services or services at discounted fees to consumers;
- (2) Advertising free services or services at discounted fees to consumers, including by use of coupons;
- (3) Advertising that CCA considers to be "sensational," "undignified," or not in "good taste"; and
- (4) Implying that they possess "unusual expertise," provided, however, that CCA may restrict members' claims of specialization, unless additional experience and educational requirements have been met that are approved by a recognized chiropractic accrediting agency.

The order does not prevent CCA from formulating reasonable ethical guidelines prohibiting advertising or other communications that CCA reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

In particular, the agreement between CCA and the Federal Trade Commission means that as long as its members do not engage in falsehood or deception, CCA cannot prevent or discourage them from engaging in the practices listed above, among others.

For more specific information you should refer to the FTC order itself. A copy of the order is enclosed.

Keith Overland, D.C.
President
Connecticut Chiropractic
Association

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Modifying Order

IN THE MATTER OF

REMOVATRON INTERNATIONAL CORPORATION, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9200. Final Order, Nov. 4, 1988—Modifying Order, Nov. 20, 1991*

This order reopens the proceeding and modifies the Commission's 1988 final order [111 FTC 206]—requiring respondents to cease making certain claims about their hair-removal device—by setting aside a provision requiring an affirmative disclosure in conjunction with certain efficacy claims. However, the respondents are still prohibited by the order from making unsubstantiated hair-removal claims.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On July 23, 1991, Removatron International Corporation and Frederick E. Goodman (Petitioners) filed a petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Rules 2.51 and 3.72 of the Commission's Rules of Practice, 16 CFR 2.51 and 3.72, to reopen the proceeding and modify the final cease and desist order issued against them by the Commission on November 4, 1988, in Docket No. 9200 (111 FTC 206), and upheld by the United States Court of Appeals for the First Circuit on September 11, 1989, in *Removatron International Corp. v. FTC*, 884 F.2d 1489 (1st Cir. 1989).

The final order in this matter was the product of litigation concerning unsubstantiated claims of permanent or long-term (as opposed to temporary) hair removal for the Removatron radio frequency energy (RFE) tweezer-type epilation device. Part I.A of the order prohibits Petitioners from making permanent or long-term hair removal representations with respect to their RFE epilator unless they possess and rely upon competent and reliable scientific evidence that substantiates such representation. The order defines competent and reliable scientific evidence as adequate and well-controlled, double-blind clinical testing conforming to acceptable designs and protocols and conducted by a person or persons qualified by training and experience to conduct such testing. Part I.B of the order prohibits Petitioners, for a period of five (5) years, from representing that their

RFE epilator is intended to or is able to remove hair unless the following disclosure is also made:

IMPORTANT: There is no reliable evidence that [name of device treatments] provides anything more than *temporary* hair removal.

The request to reopen the proceeding to set aside Part I.B of the order was filed on July 23, 1991. The request was placed on the public record for thirty days for the purpose of receiving public comment on July 29, 1991. No comments were received during the comment period.

STANDARD FOR REOPENING A FINAL ORDER OF THE COMMISSION

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be altered, modified, or set aside if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.¹ A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986) at 4. *See*, S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant change or changes causing unfair disadvantage); *see Phillips Petroleum Co.*, Docket No. C-1088, 78 FTC 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.*, Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed condition must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardship).

¹ Section 5(b) provides, in part:

[T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codified[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made." S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

The language of Section 5(b) plainly anticipates that the burden is on the requester to make “a satisfactory showing” of changed conditions to obtain reopening of the order. *See also Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (requester must show “exceptional circumstances, new, changed or unforeseen at the time the decree was entered”). The legislative history also makes clear that the requester has the burden of showing, by means other than conclusory statements, why an order should be modified.² If the Commission determines that the requester has made the necessary showing, the Commission must reopen the order to determine whether the modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the requester fails to meet its burden of making the satisfactory showing of changed conditions required by the statute. The requester’s burden is not a light one in view of the public interest in repose and finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974) (“sound basis for . . . [not reopening] except in the most extraordinary circumstances”); *RSR Corp. v. FTC*, 656 F.2d 718, 721-22 (D.C. Cir. 1981) (applying *Bowman Transportation* standard to FTC order).

CHANGED CONDITIONS OF FACT WARRANT REOPENING THE ORDER

Petitioners have requested that the Commission reopen and modify the order because changed conditions of fact and the public interest require such action. For the reasons described below, changes of fact warrant reopening and modifying the order against Petitioners. Having reopened and modified the order on the basis of changes of fact, the Commission does not reach the issue of whether the public interest warrants reopening.

Petitioners rely on a clinical study entitled “Evaluation of the Effect of Radio-Frequency Energy Delivered by the Removatron Hair Removal Device on Hair Regrowth” to support their request that Part

² The legislative history of amended Section 5(b), S. Rep. No. 96-500, 96th Cong., 2d Sess. 9-10 (1979), states:

Unmeritorious, time-consuming and dilatory requests are not to be condoned. A mere facial demonstration of changed facts or circumstances is not sufficient . . . The Commission, to reemphasize may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.

I.B of the order be set aside. The study was conducted by Nellie Konnikov, M.D., Assistant Professor of Dermatology, Tufts University School of Medicine; Chief, Dermatology Section, Boston VA Hospital; and Director, Dermatology Residency Program, Tufts-New England Medical Center. Dr. Konnikov concluded that Removatron's RFE device "appears to provide a safe, painless, and effective approach to the troublesome problem of unwanted hair." Dr. Konnikov bases this conclusion on her observation that contrary to the hair regrowth on the control sites, 46% of the facial hairs treated with the Removatron device could be considered with reasonable medical certainty to have been permanently removed.

Petitioners have also submitted the qualified opinion of a Medical Officer of the Food and Drug Administration's (FDA) Center for Devices and Radiological Health that the Konnikov study provides reasonable assurance of the efficacy of the Removatron RFE device. The Medical Officer, in a reference to the Standards for the Treatment of Permanent Hair Removal of the International Guild of Professional Electrologists, found that the range of effectiveness was in the minimum bracket of 40-50%—and the number of hairs studied per person was low. Consequently, he recommended that a statistical analysis of the study be conducted before the study could be pronounced an unqualified final determination that there is adequate evidence of safety and effectiveness of the Removatron device.³

Petitioners also had Dr. Eugene Van Scott, a dermatologist who testified as an expert on behalf of complaint counsel at the trial of this matter, review the Konnikov study. Dr. Van Scott stated that overall the study reported was designed quite well and the results appeared to be valid. However, he questioned whether the papilla was destroyed, the generally accepted definition of permanent hair removal.

Based on the foregoing, Petitioners argue that they have sufficient evidence on which to base representations of efficacy, *i.e.*, that Removatron's RFE device permanently removes hair. We do not agree. Arguably, the Konnikov study provides some evidence of permanent hair removal but it is by no means dispositive of this key issue. Supporting opinions are qualified, indicating that additional evidence will be required to substantiate permanent removal claims.

Dr. Van Scott's review of the Konnikov study is especially instructive. First, Dr. Scott proposes three possible effects of RFE on

³ The FDA, to our knowledge, has never conducted this statistical study. The FDA did compare the Konnikov study to the Standards of the International Guild of Professional Electrologists and determined there was not substantial equivalence between the RFE device and electrolysis.

the hair follicles' ability to grow hair, only one of which suggests the irreparable destruction of the papilla, the accepted definition of permanent removal. A second hypothesis is that the Removatron device merely extends the resting phase of the hair's growth period, the hair taking longer to grow back. A third hypothesis is that the Removatron device damages but does not destroy the papilla, causing the hair to grow back finer and shorter, so that it is no longer conspicuous but resembles the hair normally found in the affected region. The Konnikov study does not support the conclusion that permanent hair removal is the correct hypothesis among these three. Therefore, more study is needed.

Nevertheless, Dr. Van Scott has stated that he is convinced that RFE does something more than temporary hair removal. In his letter to the Petitioner Goodman, Dr. Van Scott wrote:

In my judgment this study does a great deal to satisfy the earlier criticisms and reservations regarding the effects of RFE on hair. In this regard consideration should be given however to positioning the claims for RFE, that is, "permanent removal" versus "diminishment of hirsutism" or some such statement to indicate that conspicuous hairs are eradicated, or conspicuous hairs fail to regrow. To insist on "permanent removal" invites the controversy over permanent destruction. In fact, if RFE can restore follicles to a state of normalcy (for the skin region involved) that is, convert follicles from producing coarse, long hairs to follicles producing short, fine hairs—which is suggested by the study of Dr. Konnikov—this would be cosmetically more desirable than trying to achieve baldness for the region. The result would be to normalize hair for that region.

Dr. Van Scott believes the study is evidence that something more profound than temporary hair removal is occurring.

PART I.B OF THE ORDER SHOULD BE SET ASIDE

Although the evidence presented is insufficient to substantiate a permanent removal representation, Part I.B does not require the same level of evidence to demonstrate a changed condition of fact. Since the evidence now demonstrates that Removatron's RFE epilation device achieves something more than temporary hair removal, Petitioners have shown that there is no need now for Part I.B of the order and that its continued application would be inequitable or harmful to competition.

It is therefore ordered, That the proceeding is hereby reopened and that Part I.B of the final order effective November 10, 1989, in Docket No. 9200 is hereby set aside.

IN THE MATTER OF
HOECHST CELANESE CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9216. Complaint, Nov. 17, 1988—Decision, Nov. 26, 1991

This consent order prohibits, among other things, a German company and its U.S. subsidiaries, for a period of ten years, from entering into any agreement, with any producer of acetal products, to allocate, divide or restrict competition in markets for acetal products. In addition, the consent order prohibits the respondents from using certain restrictions to limit competition from Daicel Chemical Industries and Polyplastics Company of Japan, their partners in a joint venture.

Appearances

For the Commission: *Rhett R. Krulla.*

For the respondents: *James T. Halverson, Shearman & Sterling,*
New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hoechst Aktiengesellschaft, a corporation, Hoechst Corporation, a corporation, and Hoechst Celanese Corporation, a corporation, hereinafter sometimes referred to as respondents, have violated said Acts, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

DEFINITION

PARAGRAPH 1. For purposes of this complaint, "acetal" means the crystalline engineering thermoplastic polymer resin known as acetal, polyacetal or polyoxymethylene (POM), and includes both acetal homopolymers, manufactured from formaldehyde and consisting of repeating oxymethylene units with esterified terminal hydroxy

groups, and acetal copolymers, having oxyethylene groups inserted randomly along the polymer chains.

THE RESPONDENTS

PAR. 2. Respondent Hoechst Aktiengesellschaft ("Hoechst AG") is a corporation organized and existing under the laws of the Federal Republic of Germany, and has its principal place of business at D-6230 (Main) 80, Frankfurt, Federal Republic of Germany. Hoechst AG is the corporate parent of respondents Hoechst Corporation and Hoechst Celanese Corporation.

PAR. 3. Respondent Hoechst Corporation is a wholly-owned subsidiary of Hoechst AG, and is the corporate parent of respondent Hoechst Celanese Corporation. Hoechst Corporation is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at Route 202-206 North, Bridgewater, New Jersey.

PAR. 4. Respondent Hoechst Celanese Corporation ("Hoechst Celanese") is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at Route 202-206 North, Bridgewater, New Jersey. Hoechst Celanese is a wholly-owned subsidiary of Hoechst Corporation, and was formed through the merger of American Hoechst Corporation and Celanese Corporation ("Celanese") on February 27, 1987.

PAR. 5. At all times relevant herein, respondents or their predecessors have been engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12; and have been corporations whose business is in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 6. Hoechst AG and its affiliates (the "Hoechst Group") include approximately 250 companies, operating in more than 120 countries. The Hoechst Group's sales in 1987 were approximately \$20.6 billion. The Hoechst Group is one of the four largest producers and marketers of chemicals and chemical-related products in the world. At the time of the acquisition described below, the Hoechst Group sold acetal throughout the world, including in the United States, and engaged in research and development relating to acetal process and application technology.

PAR. 7. Hoechst Celanese manufactures and sells, principally to industrial customers, a diversified line of products, including textile

and industrial fibers, specialty and bulk chemicals, and engineering thermoplastics, including acetal. Hoechst Celanese owns and operates 29 manufacturing plants, 24 of which are located in the United States, three of which are located in Canada, and two of which are located in Europe. In 1987 Hoechst Celanese had revenues of approximately \$4.596 billion, assets of approximately \$5.388 billion, and operating income of approximately \$418 million.

OTHER PARTIES

PAR. 8. American Hoechst Corporation ("American Hoechst") was, at the time of the acquisition described below, a corporation organized and existing under the laws of the State of Delaware, and had its principal place of business at 1041 Route 202-206 North, Somerville, New Jersey. At the time of the acquisition described below, American Hoechst was a wholly-owned subsidiary of Hoechst AG, engaged in the production and sale of various petrochemicals, plastics, and pharmaceuticals in the United States. American Hoechst sold in the United States acetal supplied by Hoechst AG. American Hoechst had sales of approximately \$1.659 billion in 1986.

PAR. 9. At the time of the acquisition described below, Celanese Corporation was a corporation organized and existing under the laws of the State of Delaware, and had its principal executive offices and place of business at 1211 Avenue of the Americas, New York, New York. Celanese's overall net income was \$178 million in 1985 on sales of approximately \$3 billion. Celanese was the leading producer of acetal in the United States. In addition, Celanese owned a 41-percent interest in Ticona Polymerwerke GMBH ("Ticona"), the leading acetal producer in Europe, and owned a 45-percent interest in Polyplastics Co., Ltd. ("Polyplastics"), the leading acetal producer in Japan. Prior to the acquisition, Celanese licensed acetal technology to Ticona and to Polyplastics, and was a licensee of acetal technology from Ticona and Polyplastics.

PAR. 10. At the time of the acquisition described below, Ticona Polymerwerke GMBH was a foreign corporation organized and existing under the laws of the Federal Republic of Germany, and had its principal place of business at Kelsterbach, Federal Republic of Germany. Ticona was then jointly owned by Hoechst AG, which owned 59% of the capital stock of Ticona, and Celanese, which owned 41% of the capital stock of Ticona. Hoechst AG and Celanese had equal representation on Ticona's board of directors. Ticona was

engaged in the manufacture of acetal, and in research and development related to acetal. Acetal manufactured by Ticona was marketed and sold by Hoechst AG throughout the world, including in the United States. In addition, Hoechst AG managed the operations of Ticona, directly or through Hoechst AG officers and employees assigned to Ticona. Prior to the acquisition, Ticona licensed acetal technology to Celanese and to Polyplastics, and was a licensee of acetal technology from Celanese and Polyplastics.

THE ACQUISITION

PAR. 11. On or about November 3, 1986, Hoechst AG and American Hoechst commenced a cash tender offer for up to 100 percent of the issued and outstanding shares of Celanese common and preferred stock, with the intent of effecting a merger of Hostachem Acquisition Incorporated, a Delaware corporation wholly-owned by American Hoechst and Hoechst AG, into Celanese, all as contemplated in the Agreement of Merger entered into among Hoechst AG, American Hoechst and Celanese, on November 2, 1986. Pursuant to that Agreement, Celanese's Board of Directors approved Hoechst's tender offer, recommended its acceptance by Celanese stockholders, and agreed to approve the merger of Hostachem Acquisition Incorporated into Celanese following the tender offer.

PAR. 12. In February 1987, pursuant to the tender offer, American Hoechst acquired over 90 percent of the outstanding shares of common and preferred stock of Celanese. On or about February 27, 1987, American Hoechst was merged into Celanese and the surviving corporation was renamed Hoechst Celanese Corporation.

THE RELEVANT MARKETS

PAR. 13. For purposes of this complaint, the relevant line of commerce in which to evaluate the effects of the acquisition is the manufacture and sale of acetal.

PAR. 14. For purposes of this complaint, the relevant geographic market is the world.

PAR. 15. In 1986, approximately 700 million pounds of acetal were sold in the world, including approximately 115 million pounds of acetal that were sold in the United States. The world acetal market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index or by four-firm and eight-firm concentration ratios.

PAR. 16. It is difficult to enter into the manufacture and sale of acetal.

PAR. 17. At the time of the acquisition described above, Celanese and Ticona were actual competitors in the manufacture and sale of acetal in the world, including in the United States.

PAR. 18. At the time of the acquisition, Celanese, and Hoechst AG and American Hoechst were actual competitors in the sale of acetal in the world, including in the United States.

THE EFFECTS OF THE ACQUISITION

PAR. 19. The effect of the aforesaid acquisition may be substantially to lessen competition with respect to the manufacture and sale of acetal in the world, including in the United States, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, because, among other things, the acquisition:

- a. Eliminated substantial actual competition between Celanese and Ticona;
- b. Eliminated substantial actual competition between Celanese, Hoechst AG and American Hoechst; and
- c. Significantly enhanced the likelihood of collusion or interdependent coordination among the remaining firms that sell or produce acetal.

THE VIOLATIONS CHARGED

PAR. 20. The acquisition of Celanese by American Hoechst and Hoechst AG violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

PAR. 21. The acquisition of Celanese by American Hoechst and Hoechst AG violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission ("the Commission"), having heretofore issued its complaint charging respondents Hoechst Aktiengesellschaft, Hoechst Corporation, and Hoechst Celanese Corporation (hereinafter collectively "respondents") with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25 of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no public comment thereon having been received, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Hoechst Aktiengesellschaft ("Hoechst AG") is a company organized and existing under the laws of the Federal Republic of Germany, and has its principal place of business at D-6230 (Main) 80, Frankfurt, Federal Republic of Germany. Hoechst AG is the corporate parent of Respondents Hoechst Corporation and Hoechst Celanese Corporation.

2. Respondent Hoechst Corporation is a wholly-owned subsidiary of Hoechst AG, and is the corporate parent of Respondent Hoechst Celanese Corporation. Hoechst Corporation is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at Route 202-206 North, Bridgewater, New Jersey.

3. Respondent Hoechst Celanese Corporation ("Hoechst Celanese") is a corporation organized and existing under the laws of the State of Delaware, and has its principal place of business at Route 202-206 North, Bridgewater, New Jersey. Hoechst Celanese is a wholly-owned subsidiary of Hoechst Corporation, and was formed through the merger of American Hoechst Corporation and Celanese Corporation ("Celanese") on February 27, 1987.

4. The Commission has issued and served upon Hoechst AG, Hoechst Corporation, and Hoechst Celanese (collectively, "Respondents") a complaint charging them with violation of Section 7 of the

